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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

v.

STEEPLETON GENERAL TIRE COMPANY, INC., AND A. E. STEEPLETON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered in this case on April 27, 1964.

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 32a–39a)[1] are unofficially reported in 15 WH Cases 582 and 45 Lab. Cases ¶ 31,315. The opinion of the court of appeals (App. 31–40) is reported at 330 F. 2d 804.

[1] "R." refers to the two-volume Joint Appendix printed for use in the court of appeals; "App.," to the appendix to this petition.

JURISDICTION

The judgments of the court of appeals were entered on April 27, 1964 (App. 41–42). A timely petition for rehearing was denied on August 3, 1964 (App. 43). By orders of Mr. Justice Stewart dated November 2, 1964, and November 30, 1964, the time for filing a petition for certiorari was extended to December 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondent's sales of tires and tire services, at substantial discounts, to trucking companies, other operators of fleets of vehicles, and governmental agencies were "recognized as retail sales or services in the particular industry" within the meaning of § 13(a)(2) and (4) of the Fair Labor Standards Act, thereby entitling respondent to exemption as a "retail or service establishment" from the minimum-wage and overtime provisions of the Act.

STATUTES INVOLVED

Sections 6, 7, and 13 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. (Supp. V) 206, 207 and 213) are set forth in pertinent part at pp. 29–30, *infra*.

STATEMENT

This action was brought by the Secretary of Labor under § 17 of the Fair Labor Standards Act (29 U.S.C. 217) to restrain violations of the minimum wage, overtime, and record-keeping requirements of the Act (R. 8a, 18a). Respondent admitted that it had not complied with those requirements (R. 22a,

30a), but contended that its employees were not engaged in interstate activities within the Act's coverage, and that the business was an exempt "retail or service establishment" under §§ 13(a)(2) and 13(a)(4) of the Act (R. 13a–16a). The court of appeals, affirming the district court, held (1) that the employees were "engaged in commerce or in the production of goods for commerce" within the Act's coverage, but (2) that respondent's business was exempt as a "retail or service establishment." This petition is directed only to the latter question, which turns upon whether more than 75% of respondent's sales were "recognized as retail sales or services in the particular industry" within the meaning of § 13(a)(2).

1. Respondent Steepleton General Tire Company, Inc., ("Steepleton"),[2] a franchised dealer for General Tire & Rubber Company at Memphis, Tennessee, is engaged in selling, repairing and servicing tires in an area which includes neighboring parts of Tennessee, Arkansas, and Mississippi (R. 33a, 46a, 109a). During the period involved in this suit the company did a gross annual business of over $900,000, and employed about 47 employees (R. 28a, 33a), many of whom were regularly employed to make sales and deliveries of merchandise in interstate commerce; to recap tires for delivery out-of-State; and to remove, repair, recap and mount tires for commercial vehicles operated by customers in interstate commerce (R. 33a, Fdg. 4).

[2] The president of the corporation, A. E. Steepleton, was also joined as a defendant, but for simplicity we will refer to the corporation as the sole respondent.

More than half of Steepleton's dollar volume of business is derived from sales to customers operating multiple units, or "fleets", of commercial vehicles and to industrial enterprises such as construction contractors operating heavy earth-moving equipment in the construction of highways and river improvements (R. 76a, 77a, 109a–110a, 177a, 185a–186a, 247a–248a). While respondent offered no evidence of the percentage of its sales of tires and services to particular customers or specific types of customers, the record is clear that most, if not all, of the largest customers operate their vehicles substantially in interstate commerce.[3] For such large customers, respondent furnishes regular repair, replacement and inspection

[3] These customers include, for example, Gordon's Transport Company, a multi-state common carrier operating about 1,000 vehicles (R. 110a, 216a); Southwestern Transportation Company (probably Steepleton's largest customer, R. 75a), another interstate common carrier, at whose place of business Steepleton keeps an employee every day to handle the large volume of business for "those trucks [which] come in and out of there at all times of the day and night" (R. 79a, 109a–110a); White Rose Industrial Laundry, which operates a fleet of 75 trucks and cars, with at least 23 trucks operating regularly in interstate transportation (R. 166a–167a); Woody Herrin, a produce dealer, who regularly operated eight over-the-road refrigerated transport trucks traveling to practically every state in the Union (R. 177a) which were serviced two or three times a week by Steepleton's employees (R. 178a); Robilio and Cuneo, food products manufacturers operating several of its 23 vehicles in transporting their products to three other states (R. 181a); Klinke-Reed Dairy, three of whose trucks regularly traveled between Tennessee and Arkansas (R. 174a); A. S. Barbaro, a wholesale beer distributor regularly operating two over-the-road transport trucks which hauled beer from Belleville, Illinois, to Memphis (R. 213a); and Central States Dredging Company, which operated 14 vehicles including Mack dump trucks and pickups used in dredging and hauling supplies in five states (R. 185a–186a).

services, not only in its shop (which remains open 12 hours a day and provides round-the-clock emergency call service, R. 78a, 122a–123a, 234a), but also daily or weekly at the major customers' own places of business, adapting the services to the customers' special needs (R. 78a–79a, 109a–110a, see fn. 3, p. 4, *supra*). Seventy-five per cent of the respondents recapping and repair services, alone comprising 35% of its gross dollar volume of sales, is performed on tires for trucks or other heavy industrial equipment of its commercial customers. (R. 48a, 265a.)

2. Representatives of the tire industry (whose testimony was confirmed by respondent's expert witness, Dr. Leigh, R. 793a–795a) testified that it is the practice of large tire establishments (such as Steepleton) to divide their sales operations into three compartments—"a tire division selling at retail, a tire division selling commercially, and a tire division selling at wholesale" (R. 345a). The "retail" division typically makes over-the-counter sales of passenger tires in small quantities to individual purchasers for their personal use. The wholesale division handles sales to dealers for resale. And the third, or "commercial," division ordinarily specializes in the sale of truck tires, usually in large quantities, to trucking fleets, construction companies, airlines, or other commercial users. To solicit the commercial sales, such establishments employ a separate staff of "commercial," as distinguished from "retail," salesmen (*e.g.*, R. 51a, 105a–106a, 263a, 344a–345a, 401a–402a, 404a, 467a–469a, 440a, 453a–454a, 793a–795a). The executive director of the industry's trade association testified that the "series of discounts on commercial tires

and truck tires is different from the deals made on new passenger tires" (R. 345a). In a letter to the Wage-Hour Administrator, he explained that "the custom in the industry [is] to sell at a price which declines as the amount of tires purchased by a buyer increases," in accordance with a generally recognized scale of discounts (often recommended by the manufacturer) from the manufacturer's list prices, with the specified discount percentages differing for sales to commercial users, to the large fleets, and for national accounts (R. 870a–872a).[4] Such reductions are offered because of the advantages stemming from large-volume sales (R. 871a).

Also introduced in evidence was the Wage and Hour Administrator's Interpretive Bulletin classify-

[4] Marsh described the scale of discounts as follows (R. 871a):

> * * * Recommended discounts for truck tires to the commercial users are 10–10% [*i.e.*, 19%, the second 10% discount being based on the price remaining after the first] with a suggested 10–10–10% for the larger fleets and 10–10–10–10% where delivery is made to "national" accounts such as Swift & Co. operating motor vehicles in many places. (One larger tire manufacturer has a discount program of 10–10–10–5%, with an increase to as much as 10–10–10–10–10–5%, for the very large buyer; if the dealer sells at this latter discount, he can replace his stock from the manufacturer at a corresponding discount.) Technically, the independent tire dealer can refuse to deliver his merchandise to consumer purchasers at these discounted prices, but he makes such a decision with full knowledge that the company-owned store of one of the tire manufacturers will quickly take over the account and might even quote a larger discount.
>
> Again, many of our members sell tires in large quantities to trucking companies at a special discount from the list price, both the discount and the list price being suggested by the manufacturer.

ing sales in the tire trade (Pltf. Ex. 6; 29 C.F.R. 779.373). The Bulletin classified as other than "retail": (1) sales made pursuant to a formal invitation to bid, such as are typically made to government agencies; (2) sales made to "national accounts" (sales in which delivery is made by a local tire dealer under a centralized pricing arrangement between the customer's national office and the tire manufacturer); and (3) sales to "fleet accounts" (customers operating five or more vehicles) at prices equivalent to those charged on sales for resale.

3. The representatives of the tire industry further testified that the word "retail" was generally used in the tire industry to denote any sale not for resale, regardless of the kind or number of tires sold, the discounts given, the nature of the customer, or any other functional characteristic (*e.g.*, R. 235a, 288a–289a, 303a, 397a, 404a, 461a, 467a–468a, 656a–657a). It was testified, for example, that the quantity sale, or specialized retreading, of airplane tires for a commercial airline; the sale of thousand-pound "earthmover" tires to a construction company; or the sale, at a substantial discount, of 50 to 100 of the largest type truck tires to an interstate common carrier, would all be characterized as "retail" no less than the over-the-counter sale of a single passenger tire to an individual purchaser (R. 247a–249a, 258a–261a, 690a–692a). The use of the word "retail" as synonymous with "not for resale" was confirmed by Dr. Leigh, respondent's expert witness (R. 429a, 434a–458a), and accounting documents dating from 1934 showed that the usage was of long

standing in the industry. The only explanation offered for the industry's usage was that it conforms to the definition of "retail" found in most State sales tax statutes (including Tennessee's) and hence facilitates the computation and payment of the tax (R. 236a–239a, 248a–249a, 253a, 303a, 353a, 397a, 579a).[4a]

The record also shows frequent use in the industry of the term "retail" in various other senses—*e.g.*, in the distinction drawn by the same industry witnesses between the "retail" departments (over-the-counter sales of passenger-car tires) and the "commercial" departments (sales of truck tires to commercial users) of the larger establishments (see p. 5, *supra*).[5] Nevertheless, if it be relevant to any issue in the case, we do not here dispute that a lexicographer preparing a glossary of terms as used in the tire industry and applying a frequency-of-usage test would probably list "not for resale" as the first definition of the word.

4. The district court concluded as a matter of law that, in making the exemption turn on whether the sales were "recognized as retail sales or services in the particular industry" (§ 13(a)(2)), Congress intended "to give recognition to the particular industry's own classification of those sales which are by it considered to be retail sales under the Act" (R. 38a). Finding in turn that the word "retail" was used in

[4a] The first sales tax law was adopted in 1932 and 13 States followed suit in 1933 alone. Due, *The Nature and Structure of Sales Taxation*, 9 Vand. L. Rev. 123, 127. Thus none of the industry's accounting records introduced in evidence antedated sales taxation.

[5] See also the court of appeals acknowledgment that some of the commercial *customers* "regarded their purchases of tires at discounts as wholesale purchases" (App. 37).

the tire industry to denote any sale not for resale, regardless of any functional differentiations among the various classes of such sales,[6] the court held respondent to be exempt as a "retail and service establishment" under § 13(a)(2) and (4) (R. 39a).

The court of appeals affirmed, upholding the district court's finding of the industry's word usage as not clearly erroneous and by implication approving its interpretation of the statute. Although the court referred frequently to the industry's "practices," "customs," and "habits," the context in each case makes clear that it was referring only to the industry's linguistic practices and, like the district court, regarded any functional differentiation among classes of sales (in price, quantity, use, *etc.*) to be irrelevant.[7] While the court did not advert to the question of interpretation as such, its opinion as a whole thus makes clear that it, like the district court, interpreted "recognized as retail" as used in the statute to mean "labeled as retail" and nothing more.

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[6] "In the tire industry sales for resale are recognized to be wholesale sales. Whereas, sales of tires to consumers or users of same are recognized to be retail sales regardless of the character or identity of the purchaser, the use to which the tires may be put, the quantities purchased or the price paid for such tires." Finding 9, R. 34a; see also Finding 14, R. 36a.

[7] See, *e.g.*, its reliance on the testimony of the "Big Four" representatives who "related the customary practices and habits in the tire industry" as being that: "Where the sale was made to an ultimate consumer it was regarded as [*i.e.*, called] retail whether made to an individual for his personal use, to a business, industrial firm, trucking or bus company and irrespective of quantity, price or discounts" (App. 35–36). See also its reliance on the testimony of Dr. Leigh that the industry's "practice" was to "call" sales not for resale "retail" (App. 36).

REASONS FOR GRANTING THE WRIT

Section 13(a)(2) of the Fair Labor Standards Act exempts from the minimum wage and overtime provisions any "retail or service establishment" whose gross sales are less than $1,000,000.[8] A "retail or service establishment" is defined as any establishment 75% of whose annual dollar volume of sales "is not for resale and is recognized as retail sales or services in the particular industry." Respondent's sales of tires to other dealers for resale were less than 25% of its total sales, but its sales of tires and services to trucking companies, other "fleet" owners, and governmental agencies totalled far more than 25%. Respondent's exemption turns, therefore, upon whether the latter sales were "recognized as retail sales or services in the particular industry."[9] The answer to that question depends in turn upon the meaning to be given to the quoted phrase.

The courts below, in effect interpreting "recognized as retail" to mean merely "labeled as retail", held that the exemption turned solely on how the word "retail" was used by the members of the industry. We contend that the quoted phrase means "treated as retail" and that the exemption thus turns upon what

[8] The limitation of the "retail" exemption to establishments with gross sales under $1,000,000 (or under $250,000 if the establishment is part of a multi-establishment enterprise with sales over $1,000,000) was added by the 1961 amendments. See §§ 3 (s) and 13(a)(2)(i), 29 U.S.C. (Supp. V) 203(s), 213(a)(2)(i). Less than 1% of the tire dealers in the nation have sales exceeding that amount (see R. 338a).

[9] Respondent's "national account" sales, added to the sales for resale, would not by themselves exceed 25% of the total sales and are therefore not determinative of the exemption.

the industry does, not what it says. In applying the exemption, in our view, it is necessary first to determine what *Congress* meant by "retail"—in order to determine the class of goods and services the sale of which is within the "retail" concept—and then to determine whether the particular sale of such goods or services was treated in the industry "as" a "retail" or a "wholesale" sale, a question which in turn depends upon the quantity and price at which the sale was made.

The question thus posed—whether the exemption turns on what the industry actually does or merely on how it chooses to use the word "retail"—is one of fundamental importance in the administration of the Act. Industries engaged in selling goods or services to other industries, not for resale but for use by them in producing other goods and services, cover a wide spectrum of the American economy and employ hundreds of thousands of persons. But a few of the kinds of goods and services so sold are coal, oil, ice, business machines, and vending machines; manufacturing, transportation, construction, road-building, air conditioning, plumbing, heating, drilling, laboratory, bottling and printing equipment; and engineering, janitorial, accounting, advertising, printing, secretarial, investigative, warehousing, repair, guard, and investment counseling services. Given the necessary nexus to interstate commerce, the duty of any such establishment to comply with the wage-and-hour provisions of the Act will turn upon the application of the industry-recognition clause, and even now there are some 65 cases pending on the dockets of

the district courts involving that clause and its application to a diversity of businesses. While the ultimate application of the exemption will no doubt vary from industry to industry, the threshold question presented here is one that must be met and resolved in every case in which a "retail" exemption is claimed. Until that basic question has been resolved—*i.e.*, until it is settled whether the characterization is to be based on the words used in the industry or on the functional characteristics of the industry and of the sale—it is impossible even to begin to determine the proper application of the exemption to particular industries. The question presented in this case will thus affect virtually every business in the country selling goods or services to other businesses other than for resale. No more important question has arisen under the Fair Labor Standards Act, and it is plainly one warranting resolution by this Court.

I

The court of appeals' interpretation of the statute as asking only how words are used in the industry deprives the statute of rational content, is contrary to the legislative history, and is in conflict with the meaning given the statute by the Fifth and First Circuits and by this Court.

1. The court of appeals' interpretation makes the statute virtually meaningless. By reading the statute as asking simply how the word "retail" happens to be used "in the particular industry," it would make the exemption turn on a will-o'-the-wisp, and in many instances upon a search for something that does not

exist. Words are typically used with many different meanings, not only by different persons but by the same persons for different purposes, and there is no necessary reason to suppose that the word "retail" would *have* a single identifiable meaning in a particular industry—being always used in only one, and the same, sense by all persons associated with the industry.

A related implication of interpreting "recognized as" to mean "labeled as" is that it would necessarily follow that any industry making sales not for resale could elect not to be subject to the Act. Businessmen are no less entitled than Humpty-Dumpty to make words mean what they want them to mean, and if the statute was indeed intended to turn solely on word usage, there is no reason why they should not take advantage of it and adopt whatever usage entitles them to the proffered benefit. And if that is so, the statute is reduced to the absurdity of saying that every industry selling goods not for resale "shall" pay minimum wages if, but only if, the industry is willing.[10]

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[10] The court of appeals' construction of the statute does more than offend good sense and the settled canon that exemptions from the Fair Labor Standards Act are to be narrowly construed (*e.g.*, *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295), for it also raises serious doubts about the constitutionality of the statute. The way in which persons in an industry choose to define and use a word has no rational relationship to any purpose to be served by the Fair Labor Standards Act. A rule requiring one employer but not another to pay minimum wages solely because they use different dictionaries would be arbitrary in the extreme and thus violate the Due Process clause.

2. The legislative history bearing on the significance of the industry's word usage is ambivalent. Much of the discussion in the debates reflects an assumption that there exists in each industry a meaningful concept of what is "retail", that it is "discoverable in any industry by honest search," and that Congress could avoid the difficult problems of definition by simply making the exemption turn upon a finding of what that concept is in each industry (95 Cong. Rec. 12502; see also *id.*, 12497, 12510, 12516, A4570). The only things about an industry that are "discoverable * * * by honest search," we submit—however hard and long the searcher looks—are (1) how words are used in the industry and (2) what is actually done in the industry. Either the decision must turn upon a *legal* characterization of the sales based on their functional characteristics (in which event the problems of legal definition cannot be avoided) or else it must turn upon word usage in the industry. There is no other choice, for the existence of a duty cannot rationally be made to turn upon a "finding" of something that does not exist. Thus, if Congress really meant to eliminate the necessity for a legal characterization of sales, and to make the exemption turn simply upon a finding of fact of what the industry's conception of a "retail" sale is, the statute can rationally be applied only in the manner in which it was applied below—*i.e.*, by the court becoming a lexicographer and merely recording how certain persons in an industry happen to use a word.

Yet if anything is clear, it is that Congress plainly did *not* wish that to be the result. Despite frequent

comments of the character noted above, each time Senator Holland, the sponsor of the amendment in the Senate, was pressed as to the implication of the statements he emphatically denied that the amendment was intended to "throw the situation wide open for each industry to determine whether its sales shall be considered retail" or to make controlling the interpretation "given to a 'retail sale' by a trade association" (95 Cong. Rec. 12501, 12510). The report of a majority of the Senate conferees confirmed those denials, expressly stating that it was not intended that "the views of trade associations * * * [or] the interpretation of any interested group should be regarded as controlling" and that the ultimate characterization was to be made by the Administrator and the courts on the basis of many factors, giving due weight "to the actual practice in the industry" (95 Cong. Rec. 14877). In short, prompted by the expressed fears of several Senators that just such an interpretation might be adopted, the authoritative spokesman for the legislation explicitly disavowed the very intent that has now been attributed to them by the court of appeals.

There is, no doubt, a logical inconsistency between those explicit disavowals that the industry's word usage was to be controlling and the statements previously noted. But a lapse in logic in congressional debates does not relieve the courts of the duty both to give a statute a rational content and to give it a content that will accomplish, as nearly as possible, the results that Congress wished accomplished. And not

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only does the court of appeals' interpretation of the statute as turning solely on word usage directly clash with the explicit disavowals of that intent but, as we will show in Point II, it will wholly fail to bring about the operative results Congress plainly meant to accomplish.

3. Although supported by a decision of the Fourth Circuit,[11] the view of the court below that the industry's word usage is controlling, and other factors irrelevant, is in conflict with the views of the Fifth and First Circuits. In *Mitchell* v. *City Ice Co.*, 273 F. 2d 560, a directed verdict that an establishment selling ice at a discount to shrimp-boat operators was exempt was set aside by the Fifth Circuit notwithstanding the unanimous testimony of industry members that "in their opinion sales of ice that were not for resale were retail sales" (pp. 561–562). Stating that "what is recognized *in* a particular industry to be retail can be proved objectively; proof is not restricted to the subjective test of what the members of industry think of it," the court held that consideration must be given to "all the circumstances surrounding the sales, including the great difference in price between the admittedly retail sales and the large or commercial sales" and that the "opinions" of industry members and expert witnesses were "to be weighed in light of their self-interest as well as the reasoning with which they supported them" (pp. 561–562).[12]

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[11] *Wirtz* v. *Modern Trashmoval, Inc.*, 323 F. 2d 451, certiorari denied, 377 U.S. 925.

[12] See also *Wirtz* v. *International Harvester Company*, 331 F. 2d 462, (C.A. 5), reversing a verdict for the employer on the

In *Aetna Finance Co.* v. *Mitchell,* 247 F. 2d 190, 193, the First Circuit similarly rejected, as inadequate, evidence of the industry's characterization of the small loan business as "retail financing", noting that "the sponsors of the amendatory legislation repeatedly disavowed an intention to permit each industry to decide for itself whether it was conducting a 'retail or service establishment' within the meaning of the exemption." See also *Durkin* v. *Casa Baldrich, Inc.,* 111 F. Supp. 71, 74 (D.C. P.R.), affirmed, 214 F. 2d 703 (C.A. 1).

4. The decision below is also in basic conflict, we believe, with this Court's decision in *Mitchell* v. *Kentucky Finance Co.,* 359 U.S. 290. In that case, the Court held that a small-loan business, although characterized as "retail" by the industry itself, was not eligible for the exemption. No part of the financial industry had ever been considered "retail" prior to 1949, and the Court concluded that it was not "intended by the amendment to broaden the fields of business enterprise to which the exemption would apply" but only to broaden the standard to be applied to particular sales by "business enterprises otherwise eligible under existing concepts to achieve exemption" (359 U.S. at 294). In so holding, the Court necessarily construed the statute as turning on something other than the industry's word usage; it was on

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ground that the trial court (a) had erroneously instructed the jury that the question was whether the sales were recognized as retail "by," rather than "in", the industry, and (b) had omitted from its instruction the fact that the sales to "fleet" operators were at a discount.

the meaning of the word "retail" as it was used by Congress, not as it was used by the industry, that the decision turned. Thus, despite the differing contexts in which the question arose, the decision below, interpreting the statute as turning solely on word usage, cannot, we submit, be reconciled with this Court's decision in *Kentucky Finance.*

II

If the industry's own use of the word is not the touchstone of exemption, the ultimate characterization of a sale as "retail" or not necessarily becomes a question of law to be decided on the basis of the functional characteristics of the sale. The words of the statute provide little guidance as to which functional characteristics should be determinative, and to determine the meaning of the word "retail" as used by Congress, and hence the standards to be applied in making the characterization, resort must be had to the legislative history of the provision. Cf. *Mitchell* v. *Kentucky Finance Co., supra.* That history shows, at a minimum, (1) that the distribution of goods and services of a character sold primarily to businesses engaged in interstate commerce or in the production of goods for commerce is wholly outside the retail concept and (2) that, even if the sale is otherwise within the retail concept, sales at substantial quantity discounts must be characterized as "wholesale" rather than "retail."

1. Prior to 1949, § 13(a)(2), while similarly exempting any "retail or service establishment", did not define that term. In *Roland Co.* v. *Walling,* 326 U.S.

657, this Court construed the term "retail" as limited to sales of merchandise to private purchasers for personal or household use and as not including sales of goods or services to business enterprises for use by them in producing other goods and services. On the basis of that interpretation, the Court held that an enterprise engaged in selling and repairing electric motors for use by businesses in the production of goods for commerce was not exempt as a "retail" establishment.

The goods and services furnished by the Roland Company were in their nature of use only to businesses engaged in producing other goods or services, and its sales were therefore ordinarily made only to businesses. The definition of "retail" adopted by the Court was not in terms limited to that circumstance, however, and was taken by many as meaning that *any* sale to a business user was a non-retail sale, even if the item sold was one customarily sold for personal use and even though the sale was made at exactly the same price and under exactly the same conditions as were sales to private purchasers.

The primary purpose of the 1949 amendment, it seems clear, was to preclude making any such distinction among sales of goods and services sold on the same terms to both personal and business users. The "clarification" was needed, the House conferees said, "to obviate the sweeping ruling * * * that no sale of goods or services for business use is retail" (H. Conf. Rep., 95 Cong. Rec. 14931). Senator Holland, the sponsor of the amendment in the Senate, likewise emphasized that the amendment was aimed only at

the "dicta" in the *Roland* opinion and its extension to all "business sales, no matter how small they may be and no matter how they may happen, in spite of the fact that they are completely intrastate" (95 Cong. Rec. 12497). The purpose was to make clear "that a business sale does not necessarily have to be a non-retail sale" (*id.*, 12495) and thus "do away with this artificial distinction between a retail sale on the one hand and a business sale on the other, which, regardless of the size, and regardless of the fact that it is intrastate can never be held to be a retail sale under" the existing rulings (*id.*, 12498). What was objectionable about the existing interpretation was that, "if a housewife goes to a drygoods store to buy towels, that is a retail sale, but if the proprietor of a small hotel * * * goes into the same store, is served by the same clerk, buys the same number of towels, paying exactly the same price, under no circumstances can that sale be regarded as a retail sale, because it is for a business use" (*id.*, 12494). "Our amendment," Senator Holland said, "is confined to [an] effort to get away from" that "sort of silly, illusory, and ridiculous interpretation" (*id.*, 12494–12495).

Senator Holland emphasized that he was "talking about sales which are so small in size that they cannot in any sense be called wholesale or cannot in any sense be subject to discounts because of large size" (*id.*, 12495). He thought it "impossible to distinguish" between admittedly retail sales to private purchasers and "sales in small volume—which are recognized in an industry as retail—and sales to a local hotel or local laundry or to a local business building

or city hall or courthouse or any other business place, when the sale is a part of the normal, everyday retail business, assuming that the sale is not made in such quantity that discounts are allowed" (*id.*, 12501). He immediately added, however, that: "Of course, if it is [*i.e.*, sold at quantity discounts], it comes in the category of wholesale sales" (*ibid.*). In later submitting a list of questions and answers showing the application of the amendment, he again confirmed that view, stating that: "As a general rule, sales in quantities substantially larger than those to the average buyer and at a substantial discount are regarded as wholesale and not as retail" (*id.*, 12505).

Senator Holland also assured the Senate that the actual result in the *Roland* case would "[d]efinitely not" be affected by the amendment. Noting that the Roland Company was engaged in selling "industrial goods and service" to manufacturers and other industrial and business customers, he explained that: "The market for the type of equipment is of course extremely limited, and there has been no contention anywhere that one supplying that type of equipment is engaged in a retail business" (*id.*, 12505). Elsewhere, in similarly stating that the amendment's target was the "dicta" and not the holding in *Roland*, he explained that the Roland Company's business ("furnishing machinery and repairing and keeping up electrical equipment" for manufacturers) "involved services which, by their very nature, are not to be rendered to every Tom, Dick and Harry, but which are available only to and used only by large manufacturers" (*id.*, 12497). The reports of the con-

ferees confirmed Senator Holland's assurances, expressly noting that the amendment was not intended to "exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods" (H. Conf. Rep., 95 Cong. Rec. 14932) or to "change the status of * * * establishments selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment held nonexempt in *Roland* * * *)" (95 Cong. Rec. 14877 (statement of majority of Senate conferees)).

2. From the foregoing history it is apparent both that the 1949 amendment was not intended to overrule the actual holding of the *Roland* case and that it was primarily designed only to avoid the anomalous implication that sales of the same goods on the same terms to businesses and to private consumers would be treated differently. The limited purpose of the amendment, together with the explicit disavowal of any purpose to change the status of sales of "industrial goods" or of "manufacturing equipment," would suggest that the retail concept was still to be confined to the distribution of the kinds of goods and services that are normally purchased for private consumption as well as for business use and was not meant to be extended to the distribution of goods and services having *only* a business use and thus not sold "to every Tom, Dick, and Harry." That conclusion must, however, be qualified to take account of the repeated statements of the amendment's sponsors that the exemption would apply to farm-implement dealers and

to an automobile dealer notwithstanding that more than 25% of his gross income was from the sale of trucks "to the local butcher, baker, or grocer" (95 Cong. Rec. 12502; see also *id.*, 12496–12498, 11003). Since neither farm equipment nor trucks are generally sold for private use, the amendment to that extent seems to have been intended also to expand the "retail" concept to include the sale of at least some kinds of goods usable only for business purposes.

Whether the expansion of the class of "retail items"—*i.e.*, the kinds of goods or services the sale of which is within the retail concept—to include some items having only a business use was intended to go beyond the two kinds of items specifically mentioned (farm implements and trucks of the kind sold to local businesses) and, if so, to what extent is unclear. That question need not be resolved in this case, however, for it is plain in all events that the exemption was not to extend beyond sales to essentially "local" businesses.[13] If any effect at all is to be given to the repeated and explicit assurances that sales of "industrial goods" and of "manufacturing equipment" would continue to be non-retail, the very minimum distinction that must be drawn is that between items of a character sold generally to businesses engaged in a purely local business and those of a character sold primarily to businesses engaged in commerce or in the

[13] Technically, of course, farmers are engaged in producing goods for commerce. In view of the general exemption from the Act accorded to agriculture (§ 13(a)(6)), however, it is not surprising that Congress assimilated farmers to private consumers or to "local" businessmen rather than to industrial manufacturers.

production of goods for commerce. Whatever may be said of a relatively small delivery truck of the type that might be sold to a local bakery or grocery store, a truck tractor-and-trailer rig specifically designed for long-distance hauling and sold to a common carrier is surely as much of an "industrial" piece of equipment as were the electric motors sold and maintained by the Roland Company. And just as the sale of "manufacturing equipment" for use in producing goods for commerce is wholly outside the retail concept, so must be the sale of a highway transport to be used directly *in* commerce or, as here, of tires of a type and size suitable for use only on such a vehicle.

The relevance to the retail exemption of interstate commerce concepts derives from the intimate relationship of that exemption to the basic coverage of the Act. The retail exemption was originally conceived of by Congress, not as an "exception" serving some discrete policy, but as merely clarifying and confirming the basic purpose of the Act to reach only those persons engaged in commerce or in the production of goods for commerce. The close relationship of the questions was recognized by this Court in the *Roland* case, where the purpose of the retail exemption was explained as being to exempt those sales which occur "at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach" (326 U.S. at 666). It is perhaps not a great step to consider sales to "local" businesses not themselves

engaged in commerce or producing goods for commerce as sufficiently near the end of the "flow of goods in commerce" also to be exempted without doing violence to the basic policies of coverage. But to treat sales of machinery to manufacturers or of transportation equipment to interstate carriers also as exempt would be a sharp departure indeed from the basic purposes of the Act. Far from being at the "end" of the flow of goods in commerce, the function thus performed is prior to and supportive of activities which are themselves in commerce and subject to the Act.[14]

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[14] The relevance of the "interstate" or "local" character of the businesses served by the establishment to the policies underlying the "retail" exemption is reflected also in the special exemption for laundries (§ 13(a)(3)) that was added at the same time that the definition of "retail or service establishments" was adopted. That provision, thought to be necessary because there was no "retail concept" in the laundry business, is applicable only if more than 75% of the laundry's business is for "customers who are not engaged in a mining, manufacturing, transportation, or communications business" and was thus, on its face at least, cast in different terms from the definition of "retail" establishments. Yet Senator Holland explained the provision as being intended to give to laundries "the same relief from the Roland decision as the other retail and service establishments" and as involving "the same distinction * * * between work done for families and that done for the little village barbershop, beauty shop * * * or for any of the other purely local establishments" (95 Cong. Rec. 12503). The parallel seen between the two provisions by Senator Holland, who was the sponsor of both, obviously cannot exist if the "retail" concept was so expanded by the amendment as to include even sales of goods and services to, and specially adapted for use by, "mining, manufacturing, transportation, or communications" businesses.

In this case, while the record does not permit a precise breakdown, it is plain that many of the tires sold by respondent were of a size and type suitable only for use by, and in fact sold to, businesses engaged in commerce—*e.g.*, the large truck tires sold to common carriers for use on long-distance highway trucks carrying up to 30,000 pounds (R. 248a), and the huge "earthmover" tires used on heavy equipment engaged in highway or dam construction. The furnishing of the "wheels" for instrumentalities of commerce is no more a "retail" function, nor less a central link in the chain of commerce, than is the furnishing of manufacturing equipment to be used in the production of goods for commerce. Such a function had never previously been regarded as "retailing," and here, as in *Kentucky Finance*, the legislative history specifically disavowed any intent to change its status. The conclusion must be that the sale of such items, specifically adapted for use in industries engaged in commerce, is not within the "retail" concept.

3. The remaining tires sold by respondent—*e.g.*, passenger-car tires and tires sold to local businesses for use on delivery trucks—present a different question. The retail concept is admittedly applicable to such sales and the only question is whether the particular sales were "retail" or "wholesale." If that distinction is not to turn merely upon the way the industry chooses to define the words, it must depend upon the quantity and price at which the tires were sold. That those are the determining characteristics

is, moreover, confirmed by the history of the provision, particularly by Senator Holland's repeated statements that a sale "in such quantity that discounts are allowed" would "[o]f course" be "in the category of wholesale sales" (95 Cong. Rec. 12501) and that, "As a general rule, sales in quantities substantially larger than those to the average buyer and at a substantial discount are regarded as wholesale and not as retail" (*id.*, 12505).

In this case, the Administrator has adopted and published specific standards by which to determine when the discounts allowed on sales to owners of fleets of motor vehicles are sufficient to constitute a recognition that that class of sales, because of the nature of the customer and the potential or actual volume of its purchases, is unlike the normal over-the-counter sales to other customers. Those standards are well within those supported by the history of the Act and are, if anything, overly generous to tire dealers. Under those standards, in turn, more than 25 percent of respondent's sales would fail to qualify as "retail" (or at least the courts below, having based their decisions on another ground, have yet to find to the contrary).

CONCLUSION

Because of the evident importance of the question, and secondarily because of the existing conflict of decisions, this petition for certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

WAYNE G. BARNETT,
Assistant to the Solicitor General.

CHARLES DONAHUE,
Solicitor,

BESSIE MARGOLIN,
Associate Solicitor,

CARUTHERS G. BERGER,
Attorney,
Department of Labor.

DECEMBER 1964.

APPENDIX A

STATUTES INVOLVED

Sections 6, 7, and 13 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. (Supp. V) 206, 207, and 213) provide in relevant part as follows:

SEC. 6. MINIMUM WAGE

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than $1.15 an hour during the first two years from the effective date of the Fair Labor Standards Amendments of 1961, and not less than $1.25 an hour thereafter, except as otherwise provided in this section.

* * * * *

SEC. 7. MAXIMUM HOURS

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; * * *

* * * * *

SEC. 13. EXEMPTIONS

(a) The provisions of sections 6 and 7 shall not apply with respect to—

* * * * *

(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment—

(i) is not in an enterprise described in section 3(s) [*i.e.*, an enterprise with gross sales exceeding $1,000,000], * * *

* * * * *

A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * *

* * * * *

(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *

* * * * *

APPENDIX B

Nos. 15188–9

United States Court of Appeals for the Sixth Circuit

W. WILLARD WIRTZ, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT AND CROSS-APPELLEE

v.

STEEPLETON GENERAL TIRE COMPANY, INC. AND A. E. STEEPLETON, DEFENDANTS-APPELLEES AND CROSS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

Decided April 27, 1964

Before WEICK, Chief Judge, KALBFLEISCH and PECK, District Judges.

WEICK, Chief Judge: The two appeals present questions of coverage and exemption under the Fair Labor Standards Act, as amended. 29 U.S.C. § 201, et seq.

The action in the District Court was to enjoin the defendants from violating the minimum wage, overtime and record keeping provisions of the Act. It was conceded by defendants that they had not complied with the requirements of the Act, but they contended that it did not apply to their employees.

The District Judge heard the evidence and adopted findings of fact and conclusions of law. He held that the defendants' employees were engaged in commerce or in the production of goods for commerce within the meaning of the Act, and were covered by its provisions, but that their business was exempt from the requirements of the Act as a "retail or service establishment" under Sections 13(a)(2) and 13(a)(4) of the amended Act.[1] He dismissed the complaint. The Secretary of Labor appealed from the dismissal of his complaint. The defendants filed a cross-appeal from that part of the judgment which determined that they were engaged in interstate commerce and were covered by the Act.

Steepleton General Tire Company, Inc., a Tennessee corporation, was engaged in the sale and distribution of tires and tubes in the Memphis, Tennessee area, which included parts of the adjoining states of Arkansas and Mississippi. It was a franchised dealer of The General Tire & Rubber Company, an Ohio corporation manufacturing tires, tubes and other products. Steepleton provided tire recapping and repair

[1] Section 13(a) of the Amended Act exempts from the minimum wage and overtime requirements of the Act: "(2) any employee employed by any retail or serivce establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. * * * A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or * * * (4) any employee employed by an establishment which qualifies as an exempt establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells. * * *"

service in its place of business in Memphis. Its customers consisted of individuals, who purchased tires for their own personal use, and commercial users including industrial and transportation companies. Commercial accounts comprised over 50% of its business some of which purchased at discounts. Steepleton made sales to federal, state and local governments on competitive bidding. It made delivery of tires out of its inventory to national accounts sold by The General Tire & Rubber Company. In 1960, which was selected by the parties as a typical year, Steepleton's annual sales of tires amounted to about $903,520 of which $86,000 was to out of state customers and about $58,000 to customers for resale. Its salesmen made regular calls upon customers located in parts of Arkansas and Mississippi.

In our opinion, Steepleton was covered by the Act. Its employees handled, transported and worked on tires destined for these customers outside of Tennessee. The employees removed, recapped, repaired and mounted tires for use on vehicles which operated in interstate commerce. Steepleton maintained accounting records with respect to its out of state sales. This was sufficient under the law to impose coverage. *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (CA 6).

There is left for our consideration only the question whether Steepleton was exempted from the requirements of the Act as a "retail or service establishment" under Section 13(a)(2) and 13(a)(4) of the amended Act.

It was the contention of Steepleton that the tire industry recognized only two classifications of sales. The sales to dealers who purchased for resale were claimed to be classified in the tire industry as whole-

sale. All other sales to ultimate consumers or users were recognized as retail irrespective of price, quantity, discounts, or commercial or industrial character. The Secretary, on the other hand, contended that the sales to commercial or industrial users were classified in the industry as wholesale sales. These included (1) sales and services to "fleet" accounts (customers operating five or more trucks or autos for business purposes at discount prices), (2) sales to national accounts and (3) sales made in competitive bidding to federal, state or local governments.

The Act, as originally passed in 1938, provided an exemption in Section 13(a) for "(2) any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. 1060, 1067, 29 U. S. C. § 213 (a)(2).

The 1938 Act was construed by the Supreme Court to reach "employees of only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." *Roland Electrical Co.* v. *Walling,* 326 U.S. 657, 666. In order to be considered "retail sales," the sales or services had to be to an ultimate consumer for his personal use. No sales or services for business uses or purposes were considered retail. *Roland Electrical Co.* v. *Walling, supra; West Kentucky Coal Co.* v. *Walling, supra.* Under the 1938 Act, Steepleton's commercial sales would be considered as wholesale.

But Congress amended the Act in 1949. Footnote 1 herein sets forth the 1949 Amendment. The Conference Report was clear that "any sale or service, regardless of the type of customer, will have to be

treated by the Administrator and the courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service." 95 Cong. Rec. 14,932, 2 U.S. Code, Congressional Service 2241, 2264 (1949). See also 95 Cong. Rec. 11,003–11,004. The Supreme Court, in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290 construed the amended Act. Mr. Justice Harlan, who wrote the unanimous opinion of the Court, reviewed the legislative history of the 1949 amendment. He stated that it was the purpose of the amendment to reject the so-called "business use" test which had been adopted by the Administrator and approved by the Court in *Roland* "and to substitute a more flexible test, under which selling transactions would qualify as retail, if they (1) did not involve 'resale,' and (2) were recognized in the particular industry as retail." Id. p. 294.

The only question in this case, therefore, is whether the sale of tires to commercial users were recognized in the tire industry as retail. Most of the evidence offered in the District Court related to this issue.

A. E. Steepleton, president of the defendant company, had been in the tire business since 1938. He testified that sales for resale were recognized in the industry as wholesale whereas sales to the ultimate consumer were retail. Mr. Steepleton was corroborated by testimony of representatives of the four largest rubber companies in Akron—Goodyear, Firestone, Goodrich and General. These representatives of the "Big Four" related the customary practices and habits in the tire industry as far back as 1934 and they all agreed that the two part classification of tire sales in the industry was traditional. Where the sale was made to an ultimate consumer it was regarded as retail whether made to an individual for his personal

use, to a business, industrial firm, trucking or bus company and irrespective of quantity, price or discounts.

Steepleton was further corroborated by the testimony of Winston W. Marsh, Executive Secretary and General Manager of National Tire Dealers and Retreaders Association which had a membership of 3200 tire dealers and Reuben E. Hedlund, Executive Secretary of the Chicago Tire Dealers Association and editor and publisher of "This Week in Tires," a trade media.

Dr. Warren W. Leigh, who was Dean of the College of Business Administration of the University of Akron and Professor in business administration, testified as to his familiarity with the sales practices in the tire industry. He confirmed the recognition in the tire industry of primarily "two classes—the wholesale which are sales for resale and consumer sales which they call retail."

The Secretary relied on the testimony of two college professors, one from Vanderbilt University and the other from University of Tennessee, and on classifications contained in Government publications such as the Standard Industrial Classification Manual and the Bureau of Census. Dr. Robert C. Brooks, Assistant Professor of Business Administration at Vanderbilt defined retail and wholesale sales as follows:

> "In the retail and wholesale trades, which are of course a very large part of the field of marketing, the term 'retail' is applied to those transactions where the motive of the purchaser in buying is his own personal enjoyment or satisfaction.
>
> "The term 'wholesale' includes all those transactions where the motive of the purchaser is to use the product in the conduct of his business for profit making purposes, or, if it is a

non profit institution, he intends to use it for the furthering of the aims of his institution."

Dr. John R. Moore, who was professor of economics at the University of Tennessee defined retail sales "as sales to the ultimate consumer, not sales to anyone who might use the product. By ultimate consumer we generally mean the final business consumer—the person who uses the product for his own personal enjoyment. In connection with the sales—say, a sale to one who will incorporate that product in their own service, we don't regard those as retail sales.

"On the other hand, a wholesale sale would include certainly sales for resale, but would also include sales to industrial distributors, to—I should say, to consumers or professional users of the product."

These definitions, he testified, were in accord with the Standard Industrial Classification Manual definition of retailing and wholesaling and other authorities in the field of economics and marketing.

Although the definitions and classifications testified to by Doctors Brooks and Moore may have value theoretically and academically and have been adopted in some industries, they do not conform to the practices as recognized in the tire industry. Doctors Brooks and Moore cited no authority from anyone connected with the tire industry in support of their definitions or classifications.

The Secretary also called as witnesses some commercial customers of Steepleton who regarded their purchases of tires at discounts as wholesale purchases.

The Wage-Hour Administrator adopted an Interpretive Bulletin in 1959 which undertook to implement the exemption provisions under Section 13 of the amended Act as applied to the tire industry.

The Bulletin classified as wholesale, sales for resale, sales made pursuant to a formal invitation to bid, sales to national accounts and sales at discounts to customers operating five or more motor vehicles.

This Bulletin did not have the force and effect of a regulation and was not controlling upon the court. While not binding on the courts, such bulletins "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134 at 140. See also *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 580 fn. 17.

Before the Bulletin was adopted and in an effort to assist the Wage-Hour Administrator in the formation of proper classifications of sales in the tire industry, the attorneys for the four major tire companies submitted to him a joint memorandum signed by them outlining the customs and practices and the two fold recognition of sales in the industry for more than 20 years. The attorneys conferred with representatives of the Administrator in Washington. Mr. Marsh also appeared before the Administrator and presented, orally and by written memoranda, the views of the National Tire Dealers and Retreaders Association with respect to the practices in the tire industry. These efforts turned out to be fruitless. Mr. Walter E. de Bruin, an attorney for Goodyear and Mr. Marsh both testified that the Interpretive Bulletin adopted by the Administrator did not con-

form to the recognition in the tire industry as to what constituted retail and wholesale sales, but merely continued the classifications adopted by the Administrator under the original Act prior to its amendment.

It is clear to us that commercial sales including "fleet sales," and sales to governmental agencies made on invitations to bid were all regarded in the tire industry as retail sales.

With respect to sales to national accounts, they were made by the tire manufacturer and not the dealer. The manufacturer fixed the price, billed the customer, and made the collections. The dealer did not even know the price for which the tires were sold to the national account. The dealer's sole function was to make delivery out of his inventory of the tires sold by the manufacturer to the national account, which inventory was later replenished by the manufacturer who paid the dealer a commission for his service based on the dealer's cost. Bookkeeping entries of charges and credits did not change the true nature of the transaction in which the dealer acted merely as delivery agent for the manufacturer.

The District Court ruled that the Interpretive Bulletin adopted by the Administrator did not conform to the customary habits and practices recognized in the tire industry. In our opinion, this was the only conclusion the court could properly reach from the overwhelming evidence in this case. These habits and practices in the tire industry were not of recent origin nor were they adopted to avoid the provisions of the Act, but were traditional and existed for many years before the amendment was enacted.

Irrespective of whether or not the Interpretive Bulletin was valid, the burden of proof still remained on Steepleton to prove that it came within the require-

ments of the exemption provisions of the Act. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388. The District Court followed the rule in *Arnold*.

We think the burden was met. It was for the District Court to determine from all the evidence whether Steepleton was a retail and service establishment and exempt from the requirements of the Act by reason of Sections 13(a) (2) and (4). The District Judge made the factual determinations. Upon review of the record as a whole we are not convinced that the District Judge made any mistake in his findings of fact. In our judgment, they were not clearly erroneous. *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, rehearing denied, 333 U.S. 869. His conclusions of law were correct.

The judgment in each case is affirmed.

United States Court of Appeals for the Sixth Circuit

No. 15188

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT

vs.

STEEPLETON GENERAL TIRE COMPANY, INC., AND A. E. STEEPLETON, DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

(Filed April 27, 1964)

Before WEICK, Chief Judge, KALBFLEISCH and PECK, District Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

PAUL C. WEICK,
Chief Judge.

Costs: None.

United States Court of Appeals for the Sixth Circuit

No. 15189

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-CROSS APPELLEE

vs.

STEEPLETON GENERAL TIRE COMPANY, INC. AND A. E. STEEPLETON, DEFENDANTS-CROSS APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

(Filed April 27, 1964. Carl W. Reuss, Clerk.)

Before WEICK, Chief Judge, KALBFLEISCH and PECK, District Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

PAUL C. WEICK,
Chief Judge.

Costs: None.

United States Court of Appeals for the Sixth Circuit

Nos. 15188–9

W. WILLARD WIRTZ, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT AND CROSS-APPELLEE

v.

STEEPLETON GENERAL TIRE COMPANY, INC. AND A. E. STEEPLETON, DEFENDANTS-APPELLEES AND CROSS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

(Filed August 3, 1964. Carl W. Reuss, Clerk)

ORDER

Before WEICK, Chief Judge, KAEBFLEISCH and PECK, District Judges.

This cause came on to be heard on the petition for rehearing, and on consideration thereof, the Court finds that said petition is not well taken and the same is hereby overruled.

/s/ PAUL C. WEICK,
Chief Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1964